

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF  
AND  
APPENDIX**





# 77-1241

To be argued by  
HERMAN KAUFMAN

*B*  
*PJS*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

- against - :

PAUL PRIMIANO, :

Defendant-Appellant. :

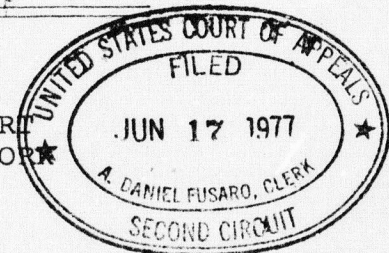
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BRIEF AND APPENDIX FOR APPELLANT PAUL PRIMIANO

=====

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



LITMAN, FRIEDMAN & KAUFMAN  
Attorney for Defendant-Appellant  
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HERMAN KAUFMAN  
JACK T. LITMAN  
of counsel

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA, :  
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 Plaintiff-Appellee, :  
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 :  
 - against - :  
 :  
 :  
 PAUL PRIMIANO, :  
 :  
 :  
 Defendant-Appellant. :  
 :  
-----X

BRIEF FOR APPELLANT PAUL PRIMIANO

STATEMENT

Paul Primiano appeals from a judgment of the United States District Court for the Eastern District of New York rendered by Judge Jack G. Weinstein on April 27, 1977. The decision is not reported.

Mr. Primiano was convicted pursuant to Title 18, United States Code, §§ 1951 and 2, of obstructing interstate commerce by attempting to rob a truck.

Mr. Primiano was sentenced to a ten year term of imprisonment.

QUESTIONS PRESENTED

1. Whether the defendant's right to jury trial was violated by the district judge's insistence that the jury, apparently in hopeless deadlock, after hearing all of the trial evidence in less than one day, deliberate after the trial, which lasted for six hours, for nearly four days.

2. Whether the defendant's right to a jury trial was violated by the district judge's insistence that one of the jurors deliberate on the evidence even though the juror, a diabetic, in a note written to the court, complained that he was ill and that he feared that he would not be paid his final salary from his employer if he did not report promptly to his employer, whose business was being terminated, the next day

#### STATEMENT OF THE CASE

In a two-count indictment filed in the United States District Court for the Eastern District, (76 Cr. 624), Paul Primiano and another unidentified person were charged, under Title 18, United States Code, §371, with conspiracy to violate Title 18, United States Code, §1951, and the substantive offense as well. Primiano was charged with obstructing interstate commerce on May 28, 1976 by attempting to rob a truck. The District Court dismissed the conspiracy count at the end of the trial prior to submitting the case to the jury.

Trial began before the Honorable Jack G. Weinstein on March 7, 1977

The Government's main witness was John Campbell, a truck driver for May Trucking Company. He testified that on May 28, 1976, he reported to work in Elizabeth, New Jersey, picked up a tractor, locked in the company's garage the night before, and drove it to Nassau Recycling in Staten Island, where a trailer



loaded with pig lead, was ready to be taken to the Lehigh Valley Railroad (Campbell 12-14, 44; Stanley 105).

Campbell drove out of the company's yard, came to a stop sign, and was about to make a left turn, when a man with a gun appeared on the running board of the passenger's side of the tractor and said, "Open the door, I got a gun." Scared, the witness was unable to stop the truck, which kept moving until it hit the curb on the opposite side of the highway. While the truck was moving, the man switched the gun to his left hand in an effort to break the window of the passenger's door. As the vehicle hit the curb, the gun accidentally fired (Campbell 15-17, 33-37, 56-57).

John Campbell usually cleaned the inside of the windows of the tractor every morning while waiting for his trailer to be loaded, and the scene of the crime and the area near Nassau Recycling did not ordinarily attract pedestrians, who were not authorized to be inside the plant area. Campbell's tractor was situated about fifty feet west of the Outerbridge Toll Booth when the police arrived. Cones were placed around it to prevent onlookers from coming near the vehicle (Campbell 19, 28-30; Ballou 64; Hickey 102-03).

That afternoon, five latent fingerprints, two from the handle of the passenger's door and three from the inside of the passenger's window, were lifted by a New York City detective

(Ballou 63-7, 73-65; Ct. Ex. 11 A). One of the latents lifted from the window -- it was pointing downward one and a half inches from the top -- was compared to the inked impression made by the defendant's left index finger at the time of his arrest on July 27 by a fingerprint specialist from the F.B.I. and the two prints were found to be the same (Ballou 67; Tricorico 82; Withers 88; Ct. Ex. 11 A-D). The other latents lifted from the window were not submitted to the expert for comparison. The latents lifted from the door handle were left there by some person other than Mr. Primiano (Withers 89, 94, 96).

There was no other evidence linking Mr. Primiano to the crime. After viewing photographs, including Mr. Primiano's on July 2, 1976, nearly one month before the defendant's arrest, Campbell was unable to identify the man in question. Nor was Campbell able to make an identification after viewing the defendant at a lineup held the following December (Campbell 18; Tricorico 109-16, 146-49). Also, Campbell's description of the assailant did not match Mr. Primiano's physical characteristics. Mr. Campbell described the assailant as a short man with a slight build, in his twenties, and well tanned; Mr. Primiano, however, stands five feet five inches tall, weighs 155 pounds and is 35 years old (Tricorico 111, 146-49).\*

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\*A photograph of Mr. Primiano, Exhibit 21, taken after his arrest on July 27, 1976, two summer months after the date of the crime, depicts a man apparently with a tan, but on the day he was arrested, Mr. Primiano was working in the bright sun with his shirt off at a construction site (146-9).



Appearing as a witness for the defense, Paul Primiano testified that on the day in question, he went crabbing under the Outerbridge Crossing, and, while on his way to the bridge, he saw a number of police and civilian vehicles and about fifteen people gathered around a tractor trailer. He pulled over onto the service road adjoining the highway, walked over to the scene and looked at the truck. He may have touched it. After remaining about a minute, he walked to the bridge on a dirt road and began crabbing (Primiano 120-23, 127-29, 130-31).

#### POINT

THE DEFENDANT'S RIGHT TO A JURY TRIAL WAS VIOLATED BY THE DISTRICT JUDGE'S INSISTENCE THAT THE JURY, APPARENTLY IN HOPELESS DEADLOCK, DELIBERATE FOR NEARLY FOUR FULL DAYS AFTER HEARING THE EVIDENCE IN LESS THAN SIX HOURS, ESPECIALLY WHERE THE JUDGE WAS ON NOTICE THAT ONE OF THE JURORS, PREOCCUPIED WITH HIS POOR HEALTH AND CERTAIN FINANCIAL MATTERS, HAD CEASED DELIBERATING ALTOGETHER.

Paul Primiano was sentenced to a jail term of ten years, following his conviction for obstructing interstate commerce in violation of Title 18, United States Code, Sections 1951 and 2. The principal question raised on this appeal is whether the defendant's right to a jury trial was violated, owing to the district judge's insistence that the jury, apparently in hopeless deadlock, following a trial lasting less than six hours, nevertheless deliberate on the proof for nearly four full days. The court must thus decide whether the unusually long period of deliberations

in this case operated to coerce the jury into rendering its verdict of guilty. A related question is whether it was fair to Mr. Primiano for the district judge to require that one of the jurors participate in the deliberations after that juror, a diabetic, expressed concern about his poor health and that the jury would not be discharged in time for the juror to receive his final paycheck from his employer who was about to move away and disband his business. However broad the discretion possessed by the district judge to control the jury's deliberations, that discretion was clearly abused in this case. It was unreasonable to require four full days of deliberations where the issue presented was litigated at a trial lasting less than six hours.

While the evidence was extremely close on the question of guilt of innocence, the ultimate issue presented to the jury was straightforward and simple. The Government's proof consisted of two fingerprints, one left by Mr. Primiano on the inside of the window of the passenger's door of the truck driven by John Campbell, and the other left by somebody else on the passenger's door handle. There was also proof of who had access to the truck before and after the commission of the crime. While the jury, on the basis of this proof alone, could not have logically decided which latent fingerprint was left during the crime, Mr. Primiano, testifying on his own behalf, offered an explanation why his fingerprint might have been left on the truck. He explained that he stopped at the scene after the crime on his way to go



crabbing at Outer Bridge Crossing and that he might have touched the vehicle while he remained to find out what had happened.\* As noted by the district judge, the issue for the jury was the relatively simple one of credibility; for the defendant, whose testimony consumed only twenty-three pages in the record, testified that he happened to be at the scene after the crime was completed. Surely the jury did not need four days to answer this question.

Nevertheless, deliberations, which commenced on the evening of March 7, upon the conclusion of the six hour trial, did not conclude until the late afternoon of March 10. The jury deliberated for four hours on the evening of March 7. The next day, March 8, the jury resumed their deliberations for nearly seven hours until 4:30 p.m. Then, after having deliberated for eleven hours, the jury foreman, in a note to the court, explained that the jurors, who were then split eight to four for conviction, were "Deadlocked" and that "We cannot come to a unanimous decision" (A 13). The court gave supplemental instructions, stating that a retrial would be expensive for the defendant, the Government, and the "citizens" (215-16), and insisted on yet another hour of deliberations that night.

Deliberations resumed on March 9, without success until about 4:00 p.m. when the defense moved for a mistrial on the ground that further deliberations would be futile. The motion was also prompted by the contents of a note received by the court

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\*The jury's decision not to credit this testimony was based unfortunately on other proof offered by the Government, showing that Mr. Primiano had a criminal record. John Campbell had been permitted to testify that he looked at a photograph of Mr. Primiano

from one juror, a diabetic, who complained that he was in "dire circumstances" due to poor health and also because of his pressing need to contact his employer within the next two days to obtain his final paycheck before the employer moved away and terminated his business (221-23). Nonetheless, deliberations were scheduled to resume the following morning, and the jury finally returned a verdict on March 10 late in the afternoon.

Plainly, it was wrong for the jury deliberations to last for a period of nearly four full days in a case where the factual issue presented was the credibility of a single witness's brief testimony. Continuing deliberations for this long clearly resulted in a coerced verdict. It was the lengthy deliberative process itself that was primarily responsible for the verdict ultimately rendered. Although, ordinarily, the district judge has considerably broad discretion to decide how long the deliberations should last [United States v. Minieri, 303 F. 2d 550, 556 (2d Cir. 1962), cert. denied, 371 U.S. 847 (1963); see also United States v. Bermudez, 526 F. 2d 89, 99-100 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); United States v. Grosso, 358 F. 2d 154 (3d Cir. 1966), rev'd on other grounds, 390 U.S. 62 (1968); DeGrandis v. Fay, 335 F. 2d 173 (2d Cir. 1964)], such discretion is, of course, not unbridled and is subject to review here. Thus, in situations different from the facts at bar, this Court held that discretion was not abused. In United States v. Bermudez, supra, for example, the trial judge reasonably concluded that a long period of

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(footnote continued) several weeks before the defendant had been arrested. The existence of such a photograph served to implant in each juror's mind that Mr. Primiano had been previously involved in a criminal case.



deliberations was necessary since the jury was presented with a number of complex factual issues raised during a long trial. Compare People v. Tarantino, 45 Cal. 2d 590, 290 P. 2d 505 (1955) (four days of deliberations after forty-four day trial reasonable). And, in McGrandis v. Fay, supra, it was not improper for the jury to continue deliberations although it may have been somewhat fatigued, hungry, or subjected to other minor discomforts.

In the present case, on the other hand, it should have been apparent to the district judge, at the very latest by the evening of March 9, the third day of deliberations, that the jury would no longer engage in meaningful and intelligent deliberations. An analysis of the record shows that the jury deliberated in a productive fashion for only two, and perhaps two and one-half days. Initially split seven to five for conviction on the evening of March 7 (Ct. Ex. 4), the jury, on the morning of March 8, requested additional instructions on the meaning of reasonable doubt and also asked the court to have the stenographer reread to them testimony of the fingerprint specialist and Mr. Primiano (212-15; Ct. Ex. 4, 5). Seven hours later, at 4:00 p.m. on March 8, the vote had shifted to eight to four for conviction (Ct. Ex. 9). As the jury itself noted (Ct. Ex. 9), deliberations came to a complete standstill at this point in the proceedings. During the last three days of "deliberations", there were no requests for rereading of testimony or additional instructions; indeed, the jury appears to have been unmoved by the modified Allen charge [Allen v. United

States, 164 U.S. 492 (1896)], which was given two days before the verdict.

It is, of course, difficult to identify at what point a trial judge should properly conclude that it would be futile to permit a hopelessly deadlocked jury to deliberate any further; however, Judge Weinstein gave little, if any, attention to the issue when it was called to his attention by the defense. After the jury had deliberated productively for two full days on what Judge Weinstein had described as a "simple" issue the judge permitted the jury to be left at bay for another two full days, a startling situation, in view of the length of the trial itself, which lasted for only about six hours of testimony. It is of course well established procedure for the trial judge, in a case where a verdict is not forthcoming after a reasonable period of time, to inquire whether the jury expects further deliberations to be fruitful. Such inquiry should be made in every case of this sort. If the jury is hopelessly deadlocked, the court always has discretion to require some short period of further deliberations, but the court must also be prepared to discharge the jury and order a mistrial when it becomes apparent that the deadlock cannot be broken. Otherwise, the deliberative process becomes an unfair pressure compelling the jury to reach a verdict so that the fact-finders may be rid of the matter before them and go home. This is precisely what happened here. As noted by Mr. Primiano's attorney below, a verdict will



always be forthcoming if you wait out the jury long enough (230-31), but such a process does not comport with the constitutional guarantee of a jury trial.

Moreover, the situation here was aggravated by the predicament confronting juror number four, who revealed on the afternoon of March 9 that he was in "dire circumstances" necessitating that he be discharged from the panel. Actually, the juror, as indicated in the note he sent to the court (A14-15), was quite agitated about what the effect of continued deliberations would have on his diabetes. Although counsel had been informed about this illness, nobody questioned it seriously, since it was assumed that the trial would only last one day. The juror was also apprehensive about whether further deliberations would force him to miss two appointments, one with his labor union representative on March 10, and another, one day later with his employer, whose company was disbanding and moving away very shortly. The appointments had been arranged so that he could pick up his severance pay and final paycheck; he was worried, of course, that if the trial lasted much longer, he would receive neither payment.

The district judge should not have required this juror to deliberate any longer, even though the court showed some concern for the man's predicament by allowing the jury to report for duty a little later than usual the next morning, March 10 (221-22). This maneuver did not cure the problem, since his preoccupation with this issue and his poor health had all but taken his mind off the case. His display of emotional distress, negating an

untroubled and clear mind, which is required of every juror, made it impossible for him to deliberate on the evidence. However he would have voted had he been concentrating on the facts before him, his vote was influenced if not dictated by his desire to see the trial ended so that he could more readily deal with the pressing problems confronting him and perhaps future unemployment. See United States v. Pleva, 66 F. 2d 529 (2d Cir. 1933). The juror's note, for all practical purposes, communicated very clearly to the district judge that he had ceased deliberating on the issue of Mr. Primiano's guilt or innocence, a circumstance, which should have led the court to discharge him immediately and declare a mistrial. Failure to take such action amounted to clear error and merely served to compound the already grave error caused by the district judge's insistence that all twelve jurors needlessly deliberate, when it was clear that their irreconcilable deadlock could not be broken.

In sum, the district judge's failure to discharge the jury prior to the rendition of a verdict entitle the defendant to a new trial.

#### CONCLUSION

THE JUDGMENT SHOULD BE REVERSED, AND A NEW TRIAL ORDERED.

Respectfully submitted,

LITMAN, FRIEDMAN & KAUFMAN  
Attorneys for Defendant-Appellant

HERMAN KAUFMAN  
JACK T. LITMAN  
of counsel





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A P P E N D I X

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U.S. MAGISTRATE Assigned U.S. 76CR 624  
1711 vs. PRIMIANO, PAUL  
OTHER MISDEMEANOR MIS. 207 1 Disp./Sentence  
FELONY 1  
Case Filed Mo. Day 9 30  
No. of Chgs. 2  
JUVENILE  
U.S. MAG. CASE NO. 1  
LAIL RELI  
AMT. ☐  
Denied ☐  
Set ☐  
\$ 000  
Date ☐  
☐ Bail Not Made  
☐ Status Changed (See Docket)  
Pty

US 18:1951 & 2 OFFENSES CHARGED Did obstruct, delay and affect commerce and the movement of articles by attempted robbery, etc. 2 ORIGINAL COUNTS 2  
II KEY DATES & INTERVALS  
ARREST or U.S. Custody Began High Risk Date Information 9-30-76 ARRAIGNMENT 10-8-76 TRIAL 3/4/77  
Summons Served Indict Waived 1st Plea NG G NOL  
First Appearance In Charging District Supervising Subject/Info Final Plea NG G NOL  
Disposition of Charges  
☐ Convicted  
☒ Acquitted  
☐ Dismissed  
☐ On Government's Motion

MAGISTRATE  
Search Warrant Issued Return  
Summons Issued Served  
Arrest Warrant Issued  
COMPLAINT  
OFFENSE (In Complaint)  
DATE INITIAL/NO. INITIAL APPEARANCE DATE PRELIMINARY EXAMINATION OR REMOVAL HEARING  
Date Scheduled Date Held  
Tape Number  
OUTCOME: ☐ DISM ☐ HELD FOR GJ OR OTHER CEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER CEEDING IN DISTRICT BE  
U.S. Attorney or Asst. ATTORNEYS Defense: ☐ CJA ☐ Ret. ☐ Waived ☐ Sett. ☐ None / Other: ☐ PD

Elia Weinbach

\* Show last names and suffix numbers of other defendants on same indictment information  
JOHN DOE 2  
DATE (DOCUMENT NO.) PROCEEDINGS EXCLUDABLE (a) (b)  
9-30-76 Information filed  
10-8-76 Before BARTELS, J. - Case called. Deft present. Counsel not present. Case adj'd to 10-12-76 at 10 A.M. Court enters a plea of not guilty on behalf of deft.  
10-12-76 Before BARTELS, J. - Case called - Deft present - Counsel not present. Order to show cause to be filed ret. 10-21-76 why counsel for should not be punished for contempt for failure to appear.  
10/13/76 Notice of Readiness for trial filed.  
10-15-76 By Bartels, J - Order to show cause, ret. Oct. 21, 1976 why counsel Jerome Giovinazzo, should not be punished for contempt, etc.  
10-21-76 Before BARTELS, J - case called - motion why deft should not be punished for contempt for failure to appear - decision reserved - case adj'd to 2-1-77 for trial - adj'd to 11-10-76 for status report at 4:30 PM.  
over.....  
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| DATE                          | IV. PROCEEDINGS (continued)                                                                                                                                                                                                                                                                                                                                                                | PAGE TWO    | V. EXCLUDABLE DELAY |                               |                    |                      |
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|                               |                                                                                                                                                                                                                                                                                                                                                                                            |             | Interval<br>(a)     | Start Date<br>End Date<br>(b) | LT<br>Court<br>(c) | Total<br>Days<br>(d) |
| 11-11-76                      | Before Bartels, J.- Case Called. Deft. not present. Counsel present. Order to show cause against atty. dismissed. Case adjd. to 11-26-76 at 5:00 P.M.                                                                                                                                                                                                                                      |             |                     |                               |                    |                      |
| 12-10-76                      | Before Bartels, J.- Case Called. Deft. not present. Counsel present. Status Conference held and concluded.                                                                                                                                                                                                                                                                                 |             |                     |                               |                    |                      |
| 2.1.77                        | Before Bartels, J.- Case Called. Deft. & Counsel present. Case adjd. to 4.4.77 for Trial.                                                                                                                                                                                                                                                                                                  |             |                     |                               |                    |                      |
| 2-4-77                        | By WEINSTEIN J - Order filed that case be pretried on 2-29-77 at 9:30 am - Barries notified.                                                                                                                                                                                                                                                                                               |             |                     |                               |                    |                      |
| 2-9-77                        | Before WEINSTEIN J - case called - deft & counsel present - Pre Trial conference held & concluded - trial set for Mar. 4, 1977 at 9:30 am - Expert is granted in forma pauperis - submit Order and inancial affidavit.                                                                                                                                                                     |             |                     |                               |                    |                      |
| 3-4-77                        | Before WEINSTEIN J - case called - deft not present - Bench warrant ordered - case called - deft & counsel present - Bench Warrant vacated - Trial ordered and BEGUN - Jurors selected and sworn - trial resumed on 3-7-77.                                                                                                                                                                |             |                     |                               |                    |                      |
| 3.7.77                        | Before Weinstein, J.- Case Called. Trial resumed. Govt. rests. Deft. rests. Both sides rest. Govt. sums up. Deft. sums up. Govt. rebuttal. Court charges Jury.- Requests to charge. Alternates discharged. Trial continued to 3.8.77.                                                                                                                                                      |             |                     |                               |                    |                      |
| 3.7.77                        | By Weinstein, J.- Order of Sustenance filed.                                                                                                                                                                                                                                                                                                                                               |             |                     |                               |                    |                      |
| 3.7.77                        | By Weinstein, J.- Order of Transportation filed.                                                                                                                                                                                                                                                                                                                                           |             |                     |                               |                    |                      |
| 3-8-77                        | By Weinstein J - Order of sustenance filed.                                                                                                                                                                                                                                                                                                                                                |             |                     |                               |                    |                      |
| 3-8-77                        | Before Weinstein J - case called - deft & atty A.Giovinazzo present - trial resumed - Jury resumes deliberation at 9:30 am - trial contd to 3-9-77 at 9:30 am                                                                                                                                                                                                                              |             |                     |                               |                    |                      |
| 3/9/77                        | Before WEINSTEIN, J.- Case called. Deft & Counsel present. Trial resumed. Jury resumes deliberation at 9:30 a.m. Order of sustenance signed. Trial continued to 5/10/77 at 11:30 a.m.                                                                                                                                                                                                      |             |                     |                               |                    |                      |
| 3/9/77                        | y WEINSTEIN, J. - Order of sustenantee signed.                                                                                                                                                                                                                                                                                                                                             |             |                     |                               |                    |                      |
| 3/10/77                       | By WEINSTEIN, J.- Order of sustenance signed.                                                                                                                                                                                                                                                                                                                                              |             |                     |                               |                    |                      |
| 3/10/77                       | Before WEINSTEIN, J. - Case called. Deft & Counsl pzent. Trial resumed. Jury resumes deliberations. Jury returns from deliberations and renders a verdict of guilty as to count 2. Jury polled and discharged. Count 1 was previously dismissed by the Court. Defts motion to set aside the verdict is denied. Trial concluded. Bail revoked. Deft in custody. Sentence adjd without date. |             |                     |                               |                    |                      |
| 4/18/77                       | Letters in favor Paul Primiano stating that he has worked in their employment. JLJ                                                                                                                                                                                                                                                                                                         |             |                     |                               |                    |                      |
| 4/21/77                       | Letter of Jerome Giovinazzo to Weintstein, J dtd 4/19/77 filed re sentencing will be on 4/27/77.JLJ                                                                                                                                                                                                                                                                                        |             |                     |                               |                    |                      |
| FINE AND RESTITUTION PAYMENTS |                                                                                                                                                                                                                                                                                                                                                                                            |             |                     |                               |                    |                      |
| DATE                          | RECEIPT NUMBER                                                                                                                                                                                                                                                                                                                                                                             | C.D. NUMBER | DATE                | RECEIPT NUMBER                | C.D. NUMBER        |                      |
|                               |                                                                                                                                                                                                                                                                                                                                                                                            |             |                     |                               |                    |                      |
|                               |                                                                                                                                                                                                                                                                                                                                                                                            |             |                     |                               |                    |                      |
|                               |                                                                                                                                                                                                                                                                                                                                                                                            |             |                     |                               |                    |                      |



UNITED STATES DISTRICT COURT  
CRIMINAL DOCKET

U. S. vs

PRIMIANO, Paul

76  
Yr.

624  
Docket N

| DATE               | PROCEEDINGS (continued)                                                                                                                                                    | V. EXCLUDABLE |     |
|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|-----|
|                    |                                                                                                                                                                            | (a)           | (b) |
|                    | (Document No.)                                                                                                                                                             |               |     |
| 5.9.77             | Letter filed received from Chambers addressed to Judge Weinstein written by Jerome Giovinazzo in reference to Financial Affidavit. Court of Appeals notified as requested. |               |     |
| 5-18-77            | Record on appeal certified and mailed to the court of appeals.                                                                                                             |               |     |
| 5/20/77            | Sten's transcript dtd 3/8/76 filed.jlj                                                                                                                                     |               |     |
| 5/20/77            | Sten;s transcriptt dtd 8/7/77 filed.jlj                                                                                                                                    |               |     |
| 5/20/77            | Sten's transcript dtd 4/27/77 filed.jlj                                                                                                                                    |               |     |
| <del>5-20-77</del> | <del>xxxxxx xxxxxxxx xxxxxxxx xxxxxxxx xxxxxxxx</del>                                                                                                                      |               |     |
| 5-23-77            | Scheduling order filed that record on appeal be filed on or before May 25, 1977 certified and                                                                              |               |     |
| 5-25-77            | Supplemental record to index on appeal/handed to Andrew Leider of Jerome Giovanizzo, counsel, for delivery to the court of appeals.                                        |               |     |
| 5/26/77            | Acknowledgement from C of A rec'd for index of appeal & filed.jlj                                                                                                          |               |     |
| 5/31/77            | Acknowledgement from C of A rec'd for supp record of appeal & filed.jlj                                                                                                    |               |     |

TRP:CEC:rd  
F# 763,016

★ SEP 29 1976 ★

JUDGE A.M. ....  
P.M. ....

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X  
UNITED STATES OF AMERICA

-against-

PAUL PRIMIANO and  
JOHN DOE,

Defendants.

----- X  
THE GRAND JURY CHARGES:

INDICTMENT

Cr. No. ....  
(T. 18, U.S.C. §§1951 and  
2).

76CR 624

COUNT ONE

On or about the 28th day of May, 1976, within the Eastern District of New York, the defendants PAUL PRIMIANO and JOHN DOE did knowingly, wilfully and unlawfully combine, conspire and agree together to obstruct, delay and affect commerce, as that term is defined in Section 1951(b)(3) of Title 18, United States Code, and the movement of articles and commodities in such commerce, by attempted robbery, in that the defendants PAUL PRIMIANO and JOHN DOE, did conspire to unlawfully take, by threat of physical violence, from the person and in the presence of John Campbell, an employee of Mate Trucking Company, a quantity of lead. (Title 18, United States Code, Section 1951).

COUNT TWO

On or about the 28th day of May, 1976, within the Eastern District of New York, the defendants PAUL PRIMIANO and JOHN DOE did knowingly and wilfully and unlawfully obstruct delay and affect commerce, as that term is defined by Section 1951(b)(3) of Title 18, United States Code, and the movement of articles and commodities in such commerce, by attempted robbery, in that the



defendants PAUL PRIMIANO and JOHN DOE did unlawfully attempt to take from the person and in the presence of John Campbell, an employee of Mate Trucking Company, a quantity of lead; and further for the purpose of effecting said robbery, the defendants PAUL PRIMIANO and JOHN DOE did threaten physical violence to the person of John Campbell by use of a deadly weapon. (Title 18, United States Code, Sections 1951 and 2).

A TRUE BILL

Louis J. Delma  
FOREMAN

David G. Trager  
DAVID G. TRAGER  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK

## JURY CHARGE

1  
2 THE COURT: I want you, ladies and gentlemen to  
3 follow these instructions.

4 You are the sole deciders of the facts, I have  
5 no view as to the guilt or innocence of this Defendant.  
6 I only want to see you decide the case fairly and in  
7 accordance with the evidence and the law. And anything  
8 that I've said or done which may give you the impression  
9 that I have any views should be disregarded, I have none.  
10 Don't be influenced by any of the rulings that I made.

11 I've told you that the fact that this case is  
12 brought in the name of the United States is not entitled  
13 to any weight at all, everybody in this Court is equal,  
14 nobody is entitled to any sympathy or any favor. The  
15 indictment is merely an accusation in writing, no evidence  
16 at all of guilt. This Defendant has pleaded not guilty.  
17 That means that the Government has the burden of proving  
18 him guilty beyond a reasonable doubt with respect to  
19 each element of the crime he is accused of committing.  
20 The burden never shifts throughout the trial, the  
21 Defendant doesn't have to prove his innocence, he  
22 doesn't have to submit any evidence, he doesn't have to  
23 take the witness stand. A presumption of innocence remains  
24 with the Defendant throughout the trial and must be  
25 consider . by you in your deliberation.



## JURY CHARGE

1  
2 A reasonable doubt means a doubt which is  
3 sufficient to cause a prudent person to hesitate to  
4 act in the most important affairs of his or her life.  
5 A reasonable doubt may result from the evidence or from  
6 the failure to produce evidence. Finding a Defendant  
7 guilty of a crime like this is a very serious matter  
8 and you will consider that in determining whether or  
9 not you have a reasonable doubt. But, if at the end  
10 of deliberation, you are convinced beyond a reasonable  
11 doubt that this Defendant committed the crime, you  
12 should find him guilty.

13 There's only one count; it mentions a John Doe,  
14 an unidentified person, but he's not on trial here and  
15 don't consider that person. The indictment charges  
16 that on or about the 28th day of May, 1976, within this  
17 district and this includes State Island, the Defendant,  
18 Paul Primiano and John Doe did knowingly and willfully  
19 and wrongfully obstruct, delay and effect commerce and  
20 the movement of articles and commodities in commerce by  
21 attempted robbery, in that the Defendant, Paul Primiano  
22 and John Doe did unlawfully attempt to take from the  
23 person and in the presence of John Campbell, an employee  
24 of the May Trucking Company, a quantity of lead and in  
25 the effecting of said robbery, the Defendant threatened

## JURY CHARGE

1  
2 physical violence to the person of John Campbell by  
3 using a deadly weapon. That charge is a violation of  
4 Section 1951 of Title 18, the offense is an interference  
5 with goods in Interstate Commerce by an attempt to rob  
6 the truckload using a deadly weapon.

7 The provision reads as follows, I'm reading the  
8 statute. "Whoever in any way or degree obstructs, delays  
9 or effects commerce or movement of any article or  
10 commodity in commerce by robbery or attempts to conspire  
11 so to do or permit or threaten physical violence to any  
12 person or property in furtherance of a plan or purpose  
13 to do anything in violation of this section shall be  
14 guilty of a crime." Robbery means the unlawful taking  
15 or obtaining of property from the person or presence of  
16 another against his will by means of actual threatened  
17 force or violence or threat, or force or violence. The  
18 term commerce means commerce between any point in the  
19 State, that is New York and any point outside thereof,  
20 that is New Jersey.

21 Now, the Government has to establish three  
22 things, first, that there was an interference with goods  
23 in commerce. I don't think there's any question about  
24 that as it is defined. If the goods were moving from  
25 New York to New Jersey and they were stopped or interfered



## JURY CHARGE

1  
2 with even for a few seconds, that's sufficient. Second,  
3 the interference must have been by means of violence or  
4 threat of violence or by robbery or attempt to rob.  
5 I've already read that definition, there doesn't seem  
6 to be any question about that aspect of the Government's  
7 case. Whether or not it was fired, a gun that was  
8 capable of being fired, was used and that is sufficient  
9 and third, is the one important thing, that the Defendant  
10 participated, it had to be willfull and knowing, but,  
11 there really isn't any question about the willfulness  
12 and knowingness here, it's knowing if it's done  
13 voluntarily and intentionally and not by mistake, and  
14 it's willful if it's done with the intent to violate  
15 the law, and here that would be to rob the truck.

16 So the real question here, as Counsel put it,  
17 is whether this Defendant got on the runningboard with  
18 a gun at the time the truck driver says somebody got on  
19 and attempted to stop that truck and put his hand on it  
20 then, or whether as the Defendant testified, he didn't  
21 do that, but he got on or near and he thinks he may  
22 have put his hand on it after the robbery was, or  
23 the attempted robbery was completed.

24 Obviously, a difficult aspect of your work is going  
25 to be to assess credibility and in weighing the credibility

## JURY CHARGE

1  
2 of a witness you should consider what his relationship  
3 either to the Government or to the Defendant is, the  
4 bias or interest in the outcome of the case that the  
5 witness would have, the way the witness testified,  
6 candor, the intelligence, the hesitation, the lack of  
7 hesitation, the corroboration, or the lack of it,  
8 whether it was contradicted by other credible  
9 evidence and so on. If you think a witness has will-  
10 fully sworn falsely, you can ignore that witness's  
11 testimony completely but you need not do so, you can  
12 believe a witness in part and disbelieve a witness in  
13 part.

14 This Defendant was a competent witness. He  
15 voluntarily took the stand. His testimony should not  
16 be disbelieved merely because he's the Defendant and you  
17 may rely upon so much of his testimony as you believe.  
18 In weighing his testimony, you may consider the fact  
19 that he has a vital interest in the outcome of the trial  
20 and you may also consider his explanation on the witness  
21 stand in assessing his credibility. You also have  
22 heard testimony from a witness who testified as an  
23 expert regarding fingerprints, such a witness is  
24 permitted to give an opinion by virtue of his experience  
25 and education and you should consider that witness's



JURY CHARGE

credibility the same way as you would any other witness's credibility, and you can either ignore or accept his testimony. Don't give any greater weight to testimony merely because the witness was an official either of the Federal or City Government; all witnesses should be evaluated in much the same way.

Nothing I have said, of course, should reflect or indicate my view of credibility, that's entirely up to you and the mere number of witnesses or the pieces of evidence is not necessarily decisive. You have to determine the quality of the evidence.

If you wish any of the testimony repeated, send in a note and we'll try to get it, but remember it's still in the machine, it's very difficult to try to secure it, so try to be very specific and if you don't need it, don't ask for it. If you want any of the pictures, do you want the picture and other evidence to go in, any of you, well if you should want it later, sent out a note and we'll send in whatever you want. If you want any help on the law, send in a note although, as I say, it's a relatively simple factual question, if the Defendant's fingerprints were put on during the course of the attempted robbery, then you would be warranted to find him guilty beyond a reasonable doubt

## JURY CHARGE

1  
2 and if they were put on after the robbery, then of  
3 course, you would not be warranted to find him guilty.  
4 Consider the opinions of each other, listen respectfully  
5 to each other. If you think somebody else is right,  
6 and you are wrong, don't hesitate to change your mind.  
7 You are responsible ultimately, each individually, for  
8 the verdict and that verdict must be unanimous. You  
9 assume your duties, that is without favor or prejudice,  
10 without bias, you will well and truly try this case  
11 according to the evidence and the law.

12 Is there any reason why the three Alternates  
13 should not now be discharged?

14 MR. WEINBACH: No, your Honor.

15 MR. GIOVINAZZO: No, your Honor.

16 THE COURT: The three Alternates are discharged.  
17 Get your things and go downstairs. Do not discuss the  
18 case with each other and anybody else, is that clear,  
19 until after the verdict comes in. You are free, madam,  
20 go downstairs please, go get your things.

21 Thank you.

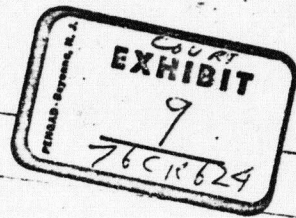
22 (ALTERNATES EXCUSED)

23 THE COURT: Do we have a Marshall here? Let's  
24 have a Marshall.

25 MR. WEINBACH: Your Honor, can we have a Side Bar?



I packed



8 Guilty  
4 Not Guilty

We cannot come to a  
unanimous decision.

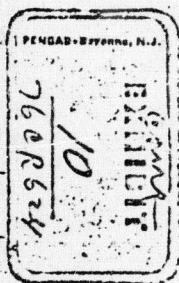
Please advise me what  
we should do.

PENGAL

76CR624

Your Honor -

I am imploring you to consider  
the dire circumstances that confronts me -  
My place of employment is terminating  
its business on Friday March 11<sup>th</sup> at 4:30 P.M.  
I have to report to 150 Broadway N.Y.C.  
today between 4 + 5 o'clock. Union Headquarters  
to sign for my absence and next day -  
tomorrow I must, if I can possibly, return  
to my place of employment, to receive  
my pay. I am under the impression due  
to their terminating their business that  
I may not receive my salary (wage on  
fund) because at the Friday there will  
be no one there but the movers.





If it is possible I would appreciate a  
release or a postponement for today and  
tomorrow. After I deal with my employees  
and union I can again resume my  
position as juror

Thank you  
Albert Gergel  
juror # 4

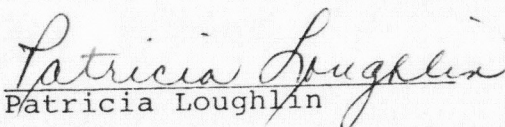
I am going under a pressure and sugar  
transmission

51

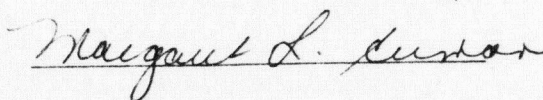
BEST COPY AVAILABLE

STATE OF NEW YORK     )  
                                   )     SS.:  
COUNTY OF NEW YORK    )

Patricia Loughlin, being duly sworn, deposes and says:  
Deponent is not a party to the action, is over 18 years of age  
and resides at 227 West 16th Street, New York, New York. On  
June 17, 1977 deponent served the within Brief and Appendix  
on Honorable David Trager, United States Attorney for the  
Eastern District of New York, 225 Cadman Plaza East, Brooklyn,  
New York the address designated by said attorneys for that  
purpose by depositing a true copy of same enclosed in a post-  
paid properly addressed wrapper in an official depository under  
the exclusive care and custody of the United States Postal  
Service within the State of New York.

  
Patricia Loughlin

Sworn to before me, this  
17th day of June, 1977



MARGARET L. EIRMAN  
Notary Public, State of New York  
No. 214606127  
Qualified in Kings County  
Commission Expires March 30, 1979



